No. 85-463

Supreme Court, U.S.
FILED
JUL 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MEYERS INDUSTRIES, INC.,
Petitioner and Intervenor Applicant,

and

NATIONAL LABOR RELATIONS BOARD,

v.

KENNETH P. PRILL,
Respondent.

MOTION OF MEYERS INDUSTRIES, INC. FOR LEAVE TO INTERVENE

GERARD C. SMETANA
(Counsel of Record)
JOSEPH J. HAHN
ARVEY, HODES, COSTELLO & BURMAN
Suite 3800
180 North LaSalle Street
Chicago, Illinois 60601
(312) 855-5038

On Behalf of Council on Labor Law Equality
Attorneys for Meyers Industries, Inc.

Pandick Midwest, Inc., Chicago • 454-7600

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MOTION FOR LEAVE TO INTERVENE

Meyers Industries, Inc., the charged party in Case No. 7-CA-17207 before the National Labor Relations Board ("Board"), pursuant to Rule 42 of the Rules of the

Supreme Court, hereby moves this nonorable Court for leave to intervene to petition for writ of certiorari from the decision of the United States Court of Appeals for District of Columbia Circuit, and in support thereof sets forth the following:

1. FACTS

Meyers Industries, Inc., as an employer, was charged by Kenneth Prill, its employee, with a violation of Section 8(a)(1) of the National Labor Relations Act ("Act") for discharging him by allegedly interfering with his rights guaranteed under Section 7 of the Act. Although the agency's Administrative Law Judge found the 8(a)(1) violation, on review, the Board reversed the findings of the Administrative Law Judge, and found that although Kenneth Prill had been discharged for refusal to

drive an unsafe truck, that refusal was not "concerted activity" within the meaning of Section 7 of the Act. At the conclusion of the Board's opinion, Meyers Industries, although the aggrieved party to the Administrative Law Judge's decision, was no longer in jeopardy because the Board had dismissed the complaint against the Company. As the basis for its decision the Board reversed a line of its previous decisions beginning with Alleluia Cushion Company, Inc., 221 NLRB 999 (1975), a decision holding that in non-collective bargaining cases when an employee "seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, [the Board] will find implied consent thereto and deem such

activity to be concerted." 221 N.L.R.B. 999, 1000 (1975).

On review of the agency's decision, the Court of Appeals for the District of Columbia disagreed with the Board's position that its definition of "concerted activities" was compelled by its interpretation of Section 7, and found that the Board failed to properly exercise its statutory discretion. Based upon this finding the appellate court, over Judge Bork's dissent, remanded the case to the Board for reconsideration in light of this Court's recent decision in N.L.R.B. v. City Disposal Systems, ____ U.S. ___, 104 Sup. Ct. 1505 (1984), a case in which the Court, citing the Board's wide discretion, upheld an NLRB decision giving a broad interpretation to the term "concerted activities" in a situation where a single employee acted,

unlike this case, within the umbrella of a collective bargaining agreement. The practical effect of the D.C. Circuit's decision was to place Meyers Industries in a position of extreme vulnerability once again.

2. Meyers Industries' Interest.

At the time of the Board's decision, Meyers Industries' vulnerability was all but eliminated, and when Kenneth Prill exercised his statutory right to petition the Court of Appeals for review the Company concluded that its position would be vigorously defended by the Board's attorneys, and that its efforts, had it timely intervened, would have been duplicative and very expensive. At that time, early 1984, the Company was in a severe financial situation which required that all costs incurred must be critical to the Company's effort to remain solvent.

Moreover, the Company concluded that its interests in the D.C. Circuit were identical with those of the National Labor Relations Board and therefore would be completely protected.

However, the D.C. Circuit's final order places Meyers Industries in an extremely difficult position. Although the company had succeeded before the Board, the Board has failed to sustain the common position on review. Meyers Industries' argument has consistently been that the Board's 1975 decision in Alleluia Cushion was an improper application of the phrase "concerted activities" in Section 7 of the Act, and therefore should be reversed. Although the Board has taken this same position in its decision and in its position on review, it has done so based upon its view that

its definition is mandated by the Act. The appellate court did not overrule the substance of the Board's decision, rather it concluded that the Board's actions were not mandated but were discretionary, and remanded the case for reconsideration in light of N.L.R.B. v. City Disposal Systems.

We have been informed that the NLRB will not file a petition for writ of certiorari. Thus, Meyers Industries' interests at this point can only be protected by permitting the Company to intervene for the limited purpose of seeking and participating in review before this Court. For these reasons, the petitioner has significant interests at stake should the Court elect to hear this case.

3. Timeliness of the Intervention

Meyers Industries, as the charged party in the proceeding before the agency,

is "a person aggrieved" within the meaning of Section 10(f) of the Act, enabling such a party to seek immediate review in the appropriate Court of Appeal, U.A.W. v. Scofield, 382 U.S. 205, 210 (1965), with the right to intervene in the Court of Appeals in any case for enforcement or review of the Board's orders. Id. at 208. This right is integral to the statutory scheme which recognizes the need to blend the private and public interests at stake. Id. at 219, 220. Had Meyers Industries intervened pursuant to Rule 15(d), Fed. R. App. P., the Company would unquestionably have standing to seek a writ of certiorari from the decision of the D.C. Circuit. See Steelworkers v. N.L.R.B., 373 U.S. 908 (1963).

Rule 15(d) Fed. R. App. P. requires that a person desiring to intervene at

the Circuit Court of Appeals in a review of an agency decision must file their petition within 30 days of the date on which the petition for review was filed. However, Meyers Industries did not petition for intervention within the 30 day limit and did not participate in any way throughout the proceeding.

The D.C. Circuit issued its decision on February 26, 1985, and Meyers Industries moved the appellate court to intervene after decision on May 14, 1985. That motion and a subsequent motion for reconsideration were denied on May 20, 1985 and June 11, 1985 respectively.1/

1/ The Appellate Court's denial of intervention is the subject of a separate petition for writ of certiorari. That separate Petition is only filed provisionally in the event the Court determines that it is procedurally inappropriate to consider the instant motion to intervene.

We ask this Court to permit Meyers Industries to intervene at this stage for three substantial reasons: First, Meyers Industries' failure to intervene at the appropriate time is excusable neglect. Second, Meyers Industries' purpose for intervention is only to protect its interests before the United States Supreme Court - interests which will not be protected by the National Labor Relations Board. Third, there is no possibility of prejudice to already existing parties.

(a) Meyers Industries petition for intervention is timely. The D.C. Circuit's decision was issued on February 26, 1985. Had Meyers Industries been a party at that time, the Company could have timely filed its petition for certiorari any time before May 26, 1985. Instead, the Company filed a petition to intervene at the Court of Appeals, for the

purpose of appeal only, on May 14, 1985, which was denied on May 20, 1985, and a motion for reconsideration on June 12, 1985. Contemporaneously, Meyers Industries requested this Court to extend the time for filing its Petition for Writ of Certiorari until July 26, 1985, which request was granted on June 3, 1985, without comment on Meyers Industries' standing before this Court.

The National Labor Relations Board also requested and received extensions of time in which to file its petition for writ of certiorari, first until June 26, 1985, then until July 26, 1985.

Thus, the Company's original petition to intervene was filed with the D.C. Circuit within the time to appeal from that Court's decision, and this motion to intervene is made within the time permitted to petition for Writ of Cer-

tiorari, as determined by the extensions granted the National Labor Relations Board.

In United Airlines v. McDonald, 432 U.S. 385 (1977), this Court considered a request to intervene on appeal by a class of flight attendants who had been denied class status but waited until after the District Court's final decision before attempting to intervene for the purpose of appeal. In holding that McDonald's request for intervention was timely, this Court considered whether the other party (United) was prejudiced and whether McDonald acted promptly after the final decision. Id. at 394. In finding that there was no prejudice to United and that McDonald acted promptly, the Court held that, "the critical inquiry in every such case is whether in view of

all the circumstances [the] intervenor acted promptly after entry of final judgment." (Citations omitted) Id. at 395, 396. In McDonald, the Court found the intervention on appeal timely because she had "filed her motion within the time in which the named plaintiffs could have taken an appeal." Id. at 396.

As in McDonald, Meyers Industries filed requests to intervene on appeal, both at the D.C. Circuit and in this Court, within the time during which the National Labor Relations Board could have filed its Petition for Writ of Certiorari.

(b) The failure to intervene earlier is excusable. As discussed above, at the time for intervention under Rule 15(d) Meyers Industries was in an impecunious state that did not reasonably permit it to expend monies for purposes that did not

directly affect its financial position in a positive way. Moreover, the Board, having adopted Meyers Industries' legal positions, was fully capable and did vigorously pursue those interests before the appellate court. Most importantly, at the present time, the Council for Labor Law Equality ("COLLE"), a nation-wide non-profit association whose purpose is to protect the legal interests of employers in matters dealing with labor law - especially on issues involving the delicate balance of the national labor policy - has most recently agreed to provide the legal assistance necessary to protect Meyer Industries' interests in this matter. Without COLLE's assistance, Meyers Industries would still not be in a position to be able to afford the expenses involved in petitioning for writ of certiorari. Meyers had previously been unaware of the

existence of COLLE. Because of this Meyers is now able to file this motion to intervene, despite the inability and failure to intervene under Rule 15(d).

(c) Meyer Industries' interests cannot otherwise be protected. This Court has recognized that when the government, as in this case, refuses to seek review of an adverse decision, the private individual whose interests were represented by the government agency, although not a party to the decision below, has a significant interest to protect. In Banks v. Chicago Grain Trimmers, 389 U.S. 813 (1967), this Court granted intervention to an individual claimant under the Longshoremen's Act when the Department of Labor declined to seek a writ of certiorari after decision of the Court of Appeals.

The Banks case is similar to this in that the petitioner widow was not a party to the case before the Seventh Circuit or the District Court and elected to pursue review for the first time in this Court.

Moreover, at least one federal circuit has concluded that when the government has abandoned its statutory right to appeal, the injured private party should be permitted intervention to appeal. See e.g., Wolpe v. Poretsky, 144 F.2d 505, 508 (D.C. Cir. 1944), a case permitting property owners to intervene after decision when the zoning commissioner failed to take appeal from an adverse zoning order, and Zuber v. Allen, 387 F.2d 862, 863 (D.C. Cir. (1967), a case permitting intervention on appeal by a private individual when

the Department of Justice failed to perfect the appeal and the intervenor's rights were placed at risk by the decision of the trial court. Both of these cases were cited with approval by this Court in McDonald, 432 U.S. at 395, n. 16.

In addition, this Court has granted intervention after decision of the Court of Appeals in several instances where an aggrieved union, not a party to the decision before the Court of Appeals, sought intervention in the case after certiorari had been granted. NLRB v. ACME Industries, 384 U.S. 925 (1966), and Beth Israel Hospital v. NLRB, 435 U.S. 940 (1978).

As in Banks, Meyers Industries is aggrieved by the decision of the D.C. Circuit and requests the opportunity to protect its interests, even though the

government agency is no longer seeking review by this Court. A denial of intervention would place the protection of Meyers Industries interests entirely in the hands of the government, whose interests, it appears, are not necessarily the same.

(d) Intervention will not prejudice any of the other parties. No delay will be occasioned by permitting Meyers Industries to intervene in the proceedings before this Court. The addition of Meyers Industries as a party before this Court cannot and will not increase the burden of either of the parties other than the possible requirement, if desired, to respond to the issues raised by the Company. There is no additional discovery, no additional witness to be examined, and no further proceedings to be held. The entire

appellate process involves writing the briefs to this Court and the limited time for oral argument.

In summary, the issue at stake herein is whether the Board's action in overruling Alleluia Cushion was properly done within the agency's statutory discretion. This is a significant issue involving the administration of the National Labor Relations Act. Certainly, the Board's view, that the language of the statute compelled it to overrule Alleluia Cushion, is far reaching. The appellate court's finding that the Board's decision ran afoul of this Court's teachings in City Disposal has even greater impact on the administration of the Act because of the restraints that holding places on Board process. Whether it is allowed to stand or is ultimately reversed, this decision will affect Meyers Industries

and all employers for a long time. Without question, it is a matter of grave national interest.

4. Conclusion

For these reasons, we respectfully request that Meyers Industries be permitted to intervene for the purpose of seeking review of the decision of the D.C. Circuit as set forth in the Petition for Writ of Certiorari filed concurrently with this motion.

Respectfully Submitted,

Gerard C. Smetana
(counsel of record)
Joseph J. Hahn
Arvey, Hodes, Costello
& Burman
Suite 3300
180 N. LaSalle Street
Chicago, Illinois 60601
(312) 855-5038
On Behalf of the Council
on Labor Law Equality
Attorneys for
Meyers Industries, Inc.